IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.698 OF 2005

WITH

CIVIL APPLICATION NO.35 OF 2006

Shri Suresh P.Thadani & Anr. ...Appellants

Versus

Brig.Adi Aspandiar Irani (Retd)

& Anr. ...Respondents

.....

Mr.S.J.Rairkar for Appellants.

Mr.Vijay G.Mujumdar for Respondents.

.....

CORAM: A.M.KHANWILKAR, J.

AUGUST 1, 2006.

P.C.

1. Heard Counsel for the parties.

2. Admit. Mr.Mujumdar waives notice for Respondents.

3. As short question is involved, Appeal is taken up for final disposal forthwith, by consent.

4. This Appeal from Order takes exception to the Judgment and Order passed by the 2nd Additional Small Causes Judge, Pune dated 5th February 2005 below Exhibit 23 in Civil Suit No.79 of 2003. By the said order, the lower Court has entertained Review Application filed by the Respondents/Plaintiffs under Section 114 of the Code of Civil Procedure and allowed the same for the reasons recorded in the impugned Judgment. The Respondents/Plaintiffs had applied for amendment of the suit claim. That amendment was partly allowed by the Trial Court by order dated 22nd June 2004. The amendment sought by the Respondents was specifically rejected by the impugned order dated 22nd June 2004. Later on, the Respondents/Plaintiffs took out subject Application being Exhibit 23 in Civil Suit No.79 of 2003 praying for review of the earlier order so that the Application Exhibit 15 which was filed by the Respondents/Plaintiffs be allowed in its entirety. The Court below was pleased to accept the said request by the impugned Judgment and order.

5. The only reason that has weighed with the Court below for accepting Application Exhibit 23 in Review Petition can be discerned from paragraph 6 of the impugned Judgment, which reads thus:

> "6. Advocate appearing for plaintiff has invited my attention in his argument to certain provisions of Maharashtra Rent Control Act. He has submitted that even though there is certain provisions in Maharashtra Rent Control Act, if in alternative it has been held that suit premises being situated in Cantonment area, this court has no jurisdiction to entertain and try the suit in present form, said notice is given with a view to bring the suit under the provisions of Transfer of Property Act. While considering the submission made by advocate appearing for plaintiff it seems that on the basis of said fact plaintiff is entitled to base his claim by way of alternate relief. Due to said reason I am of the opinion that plaintiff is entitled to amend the suit on the basis of said notice as submitted in the application below Exh.15. In the result I hold that plaintiff is entitled for the relief to review the order passed below Exh.15. I answer this point in the affirmative."

6. The limited question that requires to be considered in this Appeal is whether the lower Court was justified in entertaining the Review Application in the fact situation of the case?

7. During the hearing of this Appeal, preliminary objection was taken by the Counsel for the Respondents about the maintainability of the Appeal. However, I find substance in the reply given by the Counsel for the Appellants that this Appeal is covered by provisions of Order 43 Rule 1(w) of the Code which enables the party to file Appeal from Order against order passed on Review Application under Section 114 of the Code. The order on hand is one passed by the lower Court in exercise of powers under Section 114 of the Code. Accordingly, this Appeal from Order is maintainable.

8. As mentioned earlier, the limited controversy that needs to be addressed is whether the lower Court was justified in entertaining Review Application for the reason recorded in Paragraph 6 of the Judgment. The answer to this question will have to be obviously in the negative, relying on the recent decision of the Apex Court in the case of **Haridas Das vs. Usha Rani Banik (SMT) & Ors. reported in (2006) 4 SCC 78**. It is well established position that the scope of review is

that it is not open to the Court to record another opinion in place of the opinion recorded earlier. This is precisely what has happened in the present case as can be noted from Para 6 reproduced earlier.

9. Viewed thus, I have no hesitation in allowing this Appeal by observing that the lower Court exceeded its review jurisdiction in the fact situation of the present case. Hence, this Appeal succeeds. The impugned Judgment and Order is set-aside. However, it is observed that it will be open to the Respondents to challenge the correctness of the order passed by the Trial Court below Exhibit 15 dated 22nd June 2004 by way of remedy as may be permissible by law, which proceedings will have to be decided on its own merits in accordance with law.

10. In view of the above, accompanying Civil Applications also stands disposed of.

A.M.KHANWILKAR, J.